ST 96-36
Tax Type: SALES TAX
Issue: Nexus/Taxable Connection With Or Event Within State

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS	)	
v.	)	**Docket #**
TAXPAYER	)	**IBT #**
Taxpayer	)	

RECOMMENDATION FOR DISPOSITION

APPEARANCES

Thomas M. Newmark and Melanie R. King for TAXPAYER

SYNOPSIS

This cause came on for hearing following a Retailers' Occupation and Use Tax audit performed upon TAXPAYER (hereinafter "taxpayer") by the Illinois Department of Revenue (hereinafter the "Department") for the period of June 1, 1987 through December 31, 1988. After completion of her audit work, the auditor and her supervisor reviewed the audit findings with a representative of taxpayer who indicated his disagreement with them. Taxpayer does not agree to its liability under the audit findings primarily on the basis that as a Missouri business it lacked sufficient contacts with the State of Illinois to be required to collect and remit Illinois Use Tax on its sales to Illinois customers.

After reviewing this matter, I recommend the issues be resolved partly in favor of the taxpayer and partly in favor of the Department.

FINDINGS OF FACT

1. Taxpayer conducted business operations in Missouri during the audit period by selling furniture at retail. (Tr. p. 39)

2. During the audit period taxpayer made sales of furniture to Illinois customers who traveled to its store at St. Louis, Missouri. (Tr. pp. 30, 39)

3. The taxpayer delivered the furniture it sold to Illinois residents through its delivery carrier, CARRIER (hereinafter "CARRIER"). (Tr. pp. 14-18, 28-30)

4. The taxpayer made six sales of furniture to Illinois residents that were delivered by CARRIER in September, 1988. (Dept. Ex. No. 2, p. 19)

5. Taxpayer introduced documentary evidence at hearing to show that the prepping, deluxing, and finishing responsibilities of CARRIER for the furniture it delivered began on or about August 1, 1988. (Tr. pp. 15-16, 22, 26-27; Taxpayer Ex. No. 3)

6. Pursuant to statutory authority, the auditor did cause to be issued a Correction and/or Determination of Tax Due (SC-10) and this served as the basis for Notice of Tax Liability (NTL) No. XXXXX issued November 8, 1989 for $8,081.73, inclusive of tax, penalty and interest. (Dept. Ex. Nos. 1 and 3)

7. The introduction of the Department's corrected return and NTL into evidence established its *prima facie* case. (Tr. p. 11; Dept. Ex. Nos. 1 and 3)

CONCLUSIONS OF LAW

The issue for decision in this case is if taxpayer was required to collect and remit to the Department Illinois Use Tax from its sales of furniture or other tangible personal property to Illinois customers. Section 3-45 of the Use Tax Act imposes a use tax collection responsibility upon retailers "maintaining a place of business in this State" 35 ILCS 105/3-45. The Act defines a "Retailer maintaining a place of business in this State" to include any retailer:

> "Having or maintaining within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or

other place of business, or any agent or other representative operating within this State under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent or other representative is located here permanently or temporarily, or whether such retailer or subsidiary is licensed to do business in this State" 35 ILCS 105/2

The Department's administration of these provisions of the Illinois Use Tax Act is subject to the interpretive guidance of the courts. This area of the law regarding what economic activity in the taxing state, or nexus, is sufficient for that state to tax a business has produced substantial case law.

In National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967), the United States Supreme Court held the Department's application of Section 3 of the Illinois Use Tax Act to tax an out-of-state mail-order seller as unconstitutional where the seller's only connection with customers in Illinois was by common carrier or the U.S mail. The Bellas Hess decision held the Department's effort to assess tax violated the Due Process Clause of the Fourteenth Amendment to the U.S. constitution and created an unconstitutional burden on interstate commerce. Subsequent to Bellas Hess, the U.S. Supreme Court has analyzed the Commerce Clause and concluded that the Constitution confers no immunity from State taxation and interstate commerce must bear its fair share of the State tax burden, assuming, of course, the existence of nexus between the taxing jurisdiction and the business or activity being taxed. Washington Revenue Dept. v. Association of Wash. Stevedoring Cos., 435 U.S. 734 (1978); Japan Line Ltd. v. County of Los Angeles, 441 U.S. 434, 444 (1979); Goldberg v. Sweet, 488 U.S. 252 (1989); Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 115 S. Ct. 1331, (1995)

As long as the conditions of the four-prong test established by the U.S. Supreme Court in Complete Auto Transit v. Brady (1977), 430 U.S. 274, 279, are fulfilled, no impermissible burden on interstate commerce will exist. These four prongs are whether the tax:

(1) is applied to an activity with a substantial nexus to the taxing state;

(2) is fairly apportioned;

(3) does not discriminate against interstate commerce; and

(4) is fairly related to the services provided by the State.

The Supreme Court in Quill Corp. v. North Dakota, 112 S. Ct. 1904 (1992) noted the Due Process Clause and the Commerce Clause reflect different constitutional concerns and are analytically distinct, Quill, 112 S. Ct. at 1909, because Due Process Clause is based on concepts of "notice" and "fair warning" whereas the purpose of Commerce Clause requirements, including nexus, are based upon structural concerns about the effects of state regulation on interstate commerce, Quill, 112 S. Ct. at 1913. inform. The court overruled its Bellas Hess due process holding by finding that physical presence is no longer required to subject out-of-state retailers to a state's taxing authority so long as the seller maintains minimum contacts in the taxing state. The court also held that a business could satisfy the "minimum contacts" required for due process, such as when Quill directed its activities at North Dakota residents, and yet lack the substantial nexus with the taxing state (required under prong (1) of Complete Auto Transit), Quill, 112 S. Ct. 1911, 1913-1914.

In Quill, the Supreme Court expressed its reluctance to overrule its commerce clause holding in Bellas Hess based on reliance by state governments and businesses, but made clear that Congress could authorize use tax collection duties upon out-of-state retailers, and noted that any reluctance by Congress to do so should not be conditioned on an assumption that the Due Process Clause holding in Bellas Hess prohibited Congress from burdening interstate mail-order concerns with a duty to collect use taxes. In connection therewith, the court reaffirmed that its Commerce Clause physical presence rule in Bellas Hess continues to provide a "bright-line" rule in this area, Quill, at 1916. Recently, the Illinois Supreme Court in Browns Furniture, Inc. v. Wagner, No. 78195 (1996 Ill. Lexis 58), held that an out-of-state furniture seller who made more than occasional deliveries to Illinois customers satisfied the bright line test and was therefore subject to the Illinois use tax collection responsibility asserted by the Department.

After reviewing the facts in this case and applying the statutory provisions as interpreted by case law, I conclude taxpayer had substantial nexus with Illinois on and after August 1, 1988, when CARRIER assumed the prepping, deluxing and finishing responsibilities for the furniture taxpayer was selling to Illinois customers. I find the totality of taxpayer's activities at that time forward constitutes a physical presence that satisfies the bright line rule. In addition to the service work being performed by CARRIER, the taxpayer was advertising itself in St. Louis newspapers that had considerable circulation among Illinois residents, and the auditor documented taxpayer made six deliveries to customers in Illinois by CARRIER during September, 1988. (Dept. Ex. No. 2, pp. 19, 23-25) I conclude all this established that taxpayer had more than a slight physical presence in Illinois, Browns Furniture, at p. 9. See also Orvis Co. v. Tax Appeals Tribunal, 654 N.E. 2d 954 (1995).

In summary, I find that the liability assessed against taxpayer on and after August 1, 1988 should stand as determined by the auditor. I also find the evidence produced by taxpayer at hearing is sufficient to recommend an abatement of penalty in this case due to reasonable cause.

RECOMMENDATION

Based upon my findings and conclusions as stated above, I recommend the Department reduce NTL No. XXXXX and issue a Final Assessment.

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Karl W. Betz,
Administrative Law Judge